In the

United States Circuit Court of Appeals

For the Ninth Circuit

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No. 5020

EVERETT FRUIT PRODUCTS CO., a corporation,
Plaintiff in Error

vs.

OSCAR HOFFMAN, ELWOOD C. BOOBAR and FRED S. GREENLEE, copartners, doing business under the firm name and style of HOFFMAN & GREENLEE,
Defendants in Error

Petition for Rehearing

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The defendants in error, feeling themselves aggrieved at the decision of the Honorable Court in the above entitled cause, respectfully petition for rehearing of the cause and in event rehearing is denied that Your Honors modify your decision in the respects hereinafter pointed out.

The defendants in error respectfully submit that the court has incorrectly decided the question of practice involved where both parties move for directed verdict in this particular case through an inaccurate reading of the portions of the transcript of record where this question appears.

The plaintiff in error's motion for directed verdict was made at the close of the testimony (Tr. p. 117). The motion was followed by an argument of counsel for plaintiff in error. At the close of that argument counsel for the defendants in error joined in the motion and argued his position to the trial court. Counsel for the plaintiff in error, so far as the transcript shows, made no attempt to meet the argument of counsel for the defendants in error, although from the form of counsel's motion and his argument he must have known that counsel for the defendants in error was contending that the entire issue, both of law and fact, was to be submitted to the trial court and taken from the jury. The trial court proceeded to decide the question on this theory and counsel for the plaintiff in error at the close of the decision merely stated, "Save an exception, your Honor." (Tr. p. 121.)

The counsel for the plaintiff in error in their transcript has next placed instructions requested by

the defendant, but what actually occurred at the trial is shown on pages 125 to 133 of the transcript as follows:

The court immediately after ruling on the motions for directed verdict, without any objection, except the formal exception by counsel for the plaintiff in error, proceeded to instruct the jury as to the measure of damages and other formal instructions. At the close of these instructions counsel for the plaintiff in error proposed to take exceptions to the court's instructions and refusal to instruct and when he had finished the court made the following statement:

"Let the record show the instructions which the Court, as counsel states, did not give, and to which he excepts, were presented to the Court, laid upon the bench, after the Court had ruled upon the motions in respect to the verdict." (Tr. p. 132.)

And this is the endorsement which the court also made on requested instructions. (Tr. p. 122.) Obviously the requested instructions were not called to the court's attention until the court had not only finally determined the motions for directed verdict but had proceeded with the trial and given the jury its general instructions on the only issue which the court and counsel for the defendants in error considered still open.

Your Honors, of course, will concede that there is some point at which the right to submit issues to a jury must terminate. We submit that it is unfair to the trial court and to the parties for one party to sit by, await the rulings of the court on a motion to decide the facts, which from the form of the motion it could not possibly understand would result in anything but a final determination of the facts and the law of the case and after the motion has been denied still further sit by, allow the court to complete his instructions on the only matter left for the jury and then for the first time proceed to reopen the question of fact and ask its submission to the jury.

Every case cited by your Honors in support of your decision shows a clear reservation and request to the trial court prior to the court's final ruling on the motions to reserve to the party the right to submit issues of fact to the jury in event of a denial of the motion.

On the other hand the decisions set out in the defendants in error's brief show clearly that the federal practice is well recognized that after both parties have submitted to the ruling of the court of the motion for directed verdict, that the party can no longer insist that he has not waived his right to submit issues of fact to the jury.

While it is true that the plaintiff's motion, with his reasons given, might well have been construed as not an intention to submit issues of fact to the trial court, it is beyond the possibility of construction to say that the motion of counsel for the defendants in error did not request the court to decide the entire case. The record is conclusive that the plaintiff in error made no objection to such a submission until it found that the court's decision was adverse to it, and even then it failed to enlighten the court as to any desire on its part to submit the facts to the jury until the court had entirely completed its instructions and was about to send the jury out for its deliberation.

We, therefore, urge Your Honors to reconsider this portion of your decision and not to announce a precedent which nullifies the trial court's decision on joint motions for directed verdicts. There can not be the least doubt that if this portion of the opinion is not modified that in every case where parties join in motions for directed verdict, no matter how earnestly they lead the trial court to the opinion that they are willing to waive their right to submission to a jury, and no matter how carefully the trial court weighs the evidence and decides the case, that the disgruntled party may retract his position and take his chance with a jury.

On the merits of the case we also insist that Your Honors have incorrectly decided the case and have used language and reasoning which is counter to well founded principles of law of contract and which may throw into utter confusion the entire merchandising of canned fruits. It is pointed out in the opinion that there are six recognized grades of canned pears. Three are standard or above; three, substandard or below. In the course of the opinion Your Honors say that the specifications of substandard are meager and inherently uncertain. "The fruit is to be tolerably uniform in size and tolerably free from blemishes. 'Tolerably' has no technical signification, and colloquially its meaning is highly indefinite." In the first portion of the opinion you say, "As throwing some light upon one of the questions in issue it is to be noted that in respect to the three higher grades there is a requirement as to color and symmetry; and, further, that the fruit be ripe yet not mushy; the halves in the Fancy grade, free from blemishes, uniform in size, and very symmetrical; in the Choice, free from blemishes, uniform in size, and symmetrical; and in the Standard, reasonably free from blemishes, reasonably uniform in size, and reasonably symmetrical."

Now, we submit that "tolerably uniform in size and tolerably free from blemish" is surely as definite

and certain as "reasonably free from blemish and reasonably uniform in size and reasonably symmetrical."

Of course pears have other characteristics besides uniformity of size and freedom from blemish, as Your Honors say in your opinion. The color may have been poor, the fruit may have been overripe or not ripe enough, the halves may have wanted symmetry. The definition of substandard leaves these qualities entirely out of consideration. Therefore, a buyer and seller have no right to insist on the pears meeting any particular requirement as to these points. However, the pie fruit, even if put up in the proper percentage of sugar mixture, obviously would not be substandard, nor would water pears. Every witness in the case recognized that substandard pears was a definite grade of pears. The court seems to have entirely lost the significance of the testimony of witnesses for the defendants in error. They all testified, not that the fruit was not attractive substandard fruit, but that the fruit was not substandard. In other words, it was not tolerably uniform in size and was not tolerably free from blemish.

It is true that Judge Bourquin in rendering his decision on the motion for directed verdict did suggest that the buyer could reject if he honestly disapproved the pears, "even as it might be to his sense

of taste," but later he put the issue squarely on the good faith of the buyer in determining whether the goods met the standard. In other words the issue was not, did this buyer like the substandard pears that were offered, but did the buyer in good faith reject the pears because they were not substandard but a lower quality.

Your Honors have assumed that the seller submitted substandard pears and that the buyer still had a right to say he was honestly not satisfied with their quality. This was not the position of Judge Bourquin or the defendant in error. Our position was that the plaintiff in error submitted a canned pear which was not a substandard and so long as the buyer in good faith was not satisfied that it met the requirements of the substandards that the plaintiff in error had not performed its contract.

Your Honors say that, "If, as contended by plaintiffs, substandard is a grade of fruit of certain and uniform quality and characteristics, there was no need for the approval clause." The reason for the approval clause seems to us to be this: If the defendants in error had contracted to purchase cases of salt herring subject to approval of sample, it was entitled to have samples submitted to it to determine whether the herring to be tendered in performance

of the contract were salt herring. If the plaintiff in error had submitted samples of smoked herring, obviously both buyer and seller were interested in having that matter determined by examination of sample rather than have the bulk of the goods shipped to the buyer and then rejected as not being the goods ordered.

While it seemed to the defendants in error and to the trial court that the cases cited by the defendants in error would entitle it to reject goods if in their honest opinion they were not of the grade ordered, the testimony of the defendants in error goes still farther and the defendants in error clearly are entitled to have the court decide whether the submission of an entirely different article than substandard pear would be a compliance with the contract. Do Your Honors intend to say when a party solemnly undertakes to submit samples for approval of substandard pears, that he has complied with his obligation if he submits samples of pie fruit or water pear? Are Your Honors willing to say that the term "substandard pear," although every witness in the case testifies that it has well-known characteristics, is such an indefinite article that the submission of any pear in a can will meet the requirements of such contract? To say this Your Honors must ignore the contract entered into by the parties. It says:

"Any dispute arising as to the proper fulfillment of this contract, to be settled by arbitration. * * * If question is as to quality, actual samples to be drawn and submitted to such board as selected, their decision to be binding upon both parties to this contract." (Tr. p. 7.)

The parties signing the contract therefore specifically agreed that a question may arise as to the proper interpretation of the grade substandard. The instrument is repeatedly referred to as a contract, not as an option. If, as Your Honors suggest, the phrase "subject to approval of sample" is a conditior precedent, then the clause just quoted is meaningless for there can be no survival of warranty where goods are sold and accepted subject to inspection. *Stebbins-Walker vs. Hurley-Mason Company*, 79 Wash. 366, 140 Pac. 381.

We suggest for your consideration the proper interpretation of the contract is that if the Everett Fruit Products Company submitted samples to the defendants in error of what it claimed to be substandard pears and the defendants in error refused to accept the pears that the plaintiff in error could have called upon the purchaser to submit samples to an arbitration board and have it determined whether the quality conformed to the well defined substandards that had been established in the trade. It is our posi-

tion that purchaser, had the market been falling, could have no more rejected samples if they fairly met substandard grade, than could the seller avoid his contract by submitting to the buyer pie fruit instead of substandard pears.

As we understand it, the effect of this decision is that when A sells to B and B buys from A certain goods subject to approval of sample, such contract means nothing. It does not require A to tender any goods nor B to look at them if tendered. We are of opinion that in such contract there must be an implied condition that such approval or disapproval shall be exercised in good faith, and that the seller is bound to tender a fair sample, that the buyer is bound to accept the goods if he ought to receive them and that he can not in bad faith reject them. The suggestions in your opinion about qualities which might induce the buyer, perhaps honestly, in rejecting fruit, might perhaps be proper considerations for the court in deciding the fact whether good faith or bad faith was exercised by a buyer or seller, but should not in any way affect the rule of law applicable to such case. These matters, just as the rise or fall of the market, may be weighed by court or jury in determining whether a party acts fairly and in good faith or whether he acts in bad faith.

A contract subject to approval of sample of fancy pears should be interpreted no differently than contract for the sale on the same terms of substandard pears. As to the former, there may be less danger of dispute as to whether the party has acted in good faith because quality of that grade is more definitely determined, but, as we have heretofore pointed out, every witness in the case testified that the qualities of substandard pears are well known in the trade. It is not the lowest quality of pear by two grades. The term "approval of sample" in a contract for sale of fancy pears should be construed so that a buyer and a seller are entitled to determine from the samples and not from inspection of the bulk whether the bulk is of the grade contracted for.

The defendants in error's complaint was framed on the theory and its testimony submitted on the theory that there was a binding obligation on the part of the plaintiff in error to submit samples of substandard pears; that a substandard pear was a well defined trade name for canned pear possessing definite qualities; that the plaintiff in error submitted samples of canned pears which were not substandard pears. The testimony fully substantiates every allegation and every phase of this theory. Even Your Honors' opinion seems to indicate that there is an obligation on the plaintiff in error to submit samples.

If that is true, the contract can not lack mutuality. It would only cease to become a contract when the defendant rejected the samples, but the telegrams offered in evidence and the testimony of the case show clearly that the defendants in error did not absolutely reject the samples but demanded that samples be submitted. (Tr. p. 55.) Before the plaintiff in error was entitled to be relieved on this theory of law it should have proved that samples of substandard pears were in fact submitted.

We trust that Your Honors will give the petition careful consideration and find your way clear to affirm the decision of the trial court, but in event you feel that this is impossible, we suggest that the case be returned to the lower court with instructions to follow the issues made by the pleadings and retry the cause to a jury as to whether or not there has been a submission of samples of substandard pears, what the qualities of substandard pears are, and the measure of damage in event the jury determines that the plaintiff in error has not performed its contract.

Respectfully submitted,

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